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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 321

THE CREEK NATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 21, 1942.

CERTIORARI GRANTED OCTOBER 19, 1942.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE COURT OF CLAIMS OF THE UNITED STATES

No. F-369

THE CREEK NATION,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

The original petition was filed November 29, 1926.

On January 28, 1927, a general traverse was filed by defendant.

On May 29, 1930, on motion made therefor and allowed by the court, the plaintiff filed an amended petition.

On July 8, 1930, a general traverse was filed by defendant to plaintiff's amended petition.

On October 8, 1931, on motion made therefor and allowed by the court, the defendant filed a demurrer to the amended petition.

On December 8, 1931, the case was argued and submitted on demurrer.

On May 2, 1932, the court filed an order overruling [fol. 2] defendant's demurrer to plaintiff's amended petition without prejudice.

On May 5, 1932, a general traverse was filed by defendant to plaintiff's amended petition.

On June 4, 1932, the defendant filed a motion to require the plaintiff to make amended petition more definite and certain.

On June 16, 1932, the defendant filed a motion for rehearing on its demurrer to the amended petition.

On August 27, 1932, the defendant's motion to make amended petition more definite and certain was ordered to the Law Calendar for oral argument.

On October 10, 1932, the case was argued and submitted on defendant's motion to make amended petition more definite and certain.

On November 14, 1932, the court filed an Order allowing defendant's motion for a new trial, sustaining defendant's demurrer to amended petition and dismissing said amended petition.

[fol. 3] On November 25, 1932, plaintiff filed a motion to reinstate case and to permit same to be argued on demurrer, and said motion was allowed by the court on December 8, 1932.

On February 14, 1933, on motion made therefor and allowed by the court, the plaintiff filed its second amended petition which is as follows:

II. Second Amended Petition—Filed February 14, 1933

(Original Petition filed November 29th, 1926)

(Amended Petition filed April 16th, 1930)

To the Honorable the Court of Claims:

The plaintiff, the Creek Nation, respectfully represents: That for its first cause of action the plaintiff states:

I

That by a certain Act of Congress, approved May 24th, 1924 (43 Stat. 139, as modified by Joint Resolution ap-[fol. 4] proved May 19, 1926, 44 Stat. 568, giving permission to file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. 1229, extending the time for filing suits until June 30, 1930), plaintiff was authorized and empowered to bring this action.

II

That at all times mentioned herein, and for many years prior thereto, the Creek Nation was the owner in fee of certain lands now within the boundaries of the State of Oklahoma, which said lands constituted its National Domain. That thereafter, and by a treaty made on the 14th day of June, 1866 (14 Stat. 785), between the United States and said Creek Nation, the said Creek Nation ceded to the United States the west half of its said National Domain, reserving the east half of same which, by said treaty, was solemnly guaranteed by the United States to said Creek Nation.

III

That Article V of said Treaty of 1866 granted a right-of-way from east to west and from north to south through

the diminished Creek National Domain. Said Article V provides in part as follows:

"The Creek Nation hereby grants a right-of-way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approba-
[fol. 5] tion of the Secretary of the Interior, undertake to construct a railroad from any point north to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary."

That thereunder it became the duty of defendant to supervise the grants of said rights-of-way to two railroad companies duly authorized by Congress to construct roads through the Creek National Domain, to execute properly the provisions of said Article V; and to protect plaintiff in the quiet possession of the lands of its National Domain not so granted, as provided by Article I of said Treaty of 1866.

IV

That under said Article V the Missouri, Kansas and Texas Railway Company was authorized to construct a line of railroad from the north line of the Creek National Domain to the south line thereof. That in constructing said line of railroad it appropriated as a right-of-way therefor, a strip of land 200 feet wide, extending from the said north line of the Creek National Domain to the south line thereof, a distance of 72.5 miles.

V

That under said Article V the Atlantic and Pacific Railroad Company was authorized to construct a line of railroad from the east line of the Creek National Domain to the west line thereof.

[fol. 6] That all rights of said Atlantic and Pacific Railroad Company were assigned to the St. Louis and San Francisco Railroad, and that said last named company constructed said line of railroad. That in constructing said line of railroad, it appropriated as a right-of-way therefor, a strip of land 200 feet wide, extending from said east line of the Creek National Domain to the west line thereof, a distance of 51.25 miles.

VI

That defendant, in violation of its duties under said Article V and of the rights of the plaintiff to lands of its National Domain so guaranteed under said Treaty of 1866, permitted each of said railway companies to stake out what are known as "station reservations" along their said 200 feet of rights-of-way. That said reservations consist of an additional strip of land on each side of said rights-of-way, each of said reservations containing approximately 20 acres, which were unauthorized and unlawful intrusions upon the lands of the Creek National Domain.

VII

That said additional lands so staked out as above described were not necessary to the rights-of-way of said railroad companies or to the operation of their said railroads; that said lands were not granted or ceded by said Creek Nation under said Article V of said Treaty of [fol. 7] 1866; and that the staking out of each of said "station reservations," above described, was an unauthorized intrusion by said railroad companies upon the lands of said Creek Nation, permitted by defendant.

VIII

That said railroad companies have never used, and are not now using said lands for the purposes of operating their said railroads, but due to defendant's neglect of duty as aforesaid, have rented and are now renting the same for meadows, farm land, and, where said "station reservations" are in cities and towns, have leased the same for business purposes unconnected with the operation of said railroad companies, and have caused to be erected thereon, stores, warehouses, lumber yards, and other mercantile houses entirely unconnected with the operation of said railway companies, renting the same to tenants and deriving a profit therefrom.

IX

That after a thorough investigation and diligent search plaintiff is unable to find records in the Department of the Interior accurately describing the number of the several "station reservations" and is informed and believes

and therefore avers that the only record accurately describing the number and location of each of said reserva-
[fol. 8] tions was a certain book formerly in the Office of the Superintendent of the Five Civilized Tribes at Muskogee, Oklahoma, which said book, plaintiff is informed and believes and therefore avers, is lost and destroyed. But that the location and number of said reservations are well known to certain officers and agents of defendant and that said reservations are well defined by marks and boundaries along said rights-of-way, and can be readily located upon the taking of proof in this case.

X

That said intrusions by said railroad companies upon the said Creek National Domain, so permitted by defendant, were violations of the rights of plaintiff under Article V of said Treaty of 1866; that by defendant's failure to execute properly its duties thereunder the plaintiff has been deprived of the quiet possession and enjoyment of said lands provided for in Article I of said Treaty of 1866; and that defendant, well knowing the facts as above set forth, has failed, neglected and refused to put plaintiff in possession of same, and therefore is liable for the damage resulting to plaintiff from defendant's failure to perform properly its obligations under said Treaty of 1866.

[fol. 9] PLAINTIFF'S SECOND CAUSE OF ACTION

That for its second cause of action plaintiff states:

I

That plaintiff restates and repleads Paragraphs I and II of its first cause of action.

II

That under the general provisions of the Act of Congress, approved February 28, 1902 (32 Stat. 43), other railroad companies desiring to construct lines through the Creek National Domain were authorized to appropriate rights-of-way under the conditions prescribed therein. Thereunder it became the duty of defendant to supervise the grants of said rights-of-way to said railroad companies constructing lines of road through the Creek National

Domain, and to execute properly the provisions of said act.

III

That in addition to the railroads provided for in plaintiff's first cause of action, certain other railroad companies acquired rights-of-way of 200 feet in width through the Creek National Domain, under the terms of said Act of February 28, 1902, which said roads are particularly described as follows, to-wit:

[fol. 10] A certain railroad, now a branch line of the St. Louis and San Francisco Railroad Company, extending from Sapulpa, Oklahoma, in and through said Creek Nation to the southwestern boundary thereof; a certain railroad now a branch of the Missouri, Kansas and Texas Railroad Company, extending from Tulsa to the eastern boundary of the Creek Nation; a certain railroad known as the Midland Valley Railroad Company, extending from Tulsa to the eastern boundary of the Creek Nation; a certain railroad now a branch of the St. Louis and San Francisco Railroad Company, extending from Okmulgee to the eastern boundary of the Creek Nation; a certain railroad now known as the Kansas, Oklahoma and Gulf Railroad Company, extending from the eastern boundary of the Creek Nation to the southern boundary thereof; a certain railroad known as the Ft. Smith and Western Railroad Company, extending from the southeastern portion of the Creek Nation to the western boundary thereof; a certain railroad now known as the Chicago, Rock Island and Pacific Railroad Company, extending from the southern boundary of the Creek Nation to the eastern boundary thereof; a certain railroad now known as the St. Louis Iron Mountain and Southern Railroad Company, extending from the northeastern boundary of the Creek Nation to the eastern boundary thereof.

[fol. 11] IV

That defendant, in disregard of the provisions of said Act of February 28th, 1902, and of the rights of the plaintiff, and in violation of its covenant to guarantee to the plaintiff the quiet possession of its National Domain under the provisions of the Treaty of June 14, 1866, permitted each of said railroad companies to stake out what are

known as "station reservations" along said 200 feet of rights-of-way. That said reservations consist of an additional strip of land on each side of said rights-of-way, each of said reservations containing approximately, 20 acres, which were unauthorized and unlawful intrusions upon the lands of the Creek National Domain.

V

That said additional lands so intruded upon as above described, were not necessary to the rights-of-way of said railroad companies or to the operation of their said railroads; that said lands were not granted under said Act of February 28th, 1902; and that the staking out of each of said "station reservations" above described, was an unauthiorized intrusion by said railroad companies upon the lands of said Creek Nation, permitted by defendant.

VI

That plaintiff restates and repleads Paragraphs VIII and IX of its first cause of action.

[fol. 12]

VII

That said intrusions by said railroad companies upon the said Creek National Domain, so permitted by the defendant, were violations of the rights of the plaintiff under the said Act of February 28th, 1902; that by defendant's failure to execute properly its duties thereunder, the plaintiff has been deprived of the quiet possession and enjoyment of said lands provided for in Article I of said Treaty of June 14th, 1866; and that defendant, well knowing the facts as above set forth, has failed, neglected and refused to put plaintiff in possession of same, and therefore is liable for the damage resulting to plaintiff from defendant's failure to perform properly its obligations under said Act of February 28th, 1902, and said Treaty of 1866.

PLAINTIFF'S THIRD CAUSE OF ACTION

For its third cause of action, plaintiff states:

I

That plaintiff restates and repleads Paragraphs I and II of its first cause of action, and Paragraphs II and III of its second cause of action.

II

That Section 15 of the Act of February 28th, 1902 (32 Stat. 43), provides in part, as follows:

"Section 15. That before any railroad shall be constructed or any lands taken or condemned for any of the [fol. 13] purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands; and to the tribe or nation through or in which the same is situated;"

III

That plaintiff is informed and believes and therefore avers that no such compensation for said lands of the Creek National Domain, appropriated under the provisions of said Section 15, was ever paid by said railroad companies.

IV

That Section 16 of said Act of February 28th, 1902, provides in part as follows:

"Sec. 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein."

V

That plaintiff is informed and believes and therefore avers that said annual charge of fifteen dollars per mile [fol. 14] for each mile of road constructed has never been so paid in full to date by said railroad companies to the Secretary of the Interior, for the benefit of said Creek Nation.

VI

That the Creek Nation has owned and occupied and now so owns and occupies the lands constituting said

rights-of-way; that plaintiff is informed and believes and therefore avers that defendant, in violation of its obligations under said Act of February 28, 1902, and under said Sections 15 and 16 thereof, has failed, neglected and refused to collect the compensation provided therein for the benefit of the plaintiff; that defendant has never accounted to the plaintiff in full to date for said compensation, thus depriving plaintiff of the benefits provided therein; and therefore defendant is liable to plaintiff for defendant's failure to perform properly its said obligations.

PLAINTIFF'S FOURTH CAUSE OF ACTION

That for its fourth cause of action, the plaintiff states:

I

That plaintiff restates and repleads Paragraphs I to IX of its first cause of action and Paragraphs II to VI of its second cause of action.

II

That Section 11 of the Act approved April 26, 1906 (34 Stat. 137), states in part, as follows:

[fol. 15] "Sec. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes, * * * shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him;"

III

That under said Section 11, it became the duty of defendant to collect the rents and profits derived from plaintiff's lands, but that in violation of its duties the defendant permitted said railroad companies to rent plaintiff's lands unlawfully intruded upon, and to collect said rents and profits and to convert same to their own uses, thus depriving plaintiff of the benefits thereof; and for said failure, neglect and refusal of defendant to perform its said duties, defendant became liable to plaintiff for the amounts of said rents and profits, and that defendant has never accounted to plaintiff for the amounts of same.

Plaintiff's Fifth Cause of Action

That for its fifth cause of action the plaintiff states:

I

That plaintiff restates and repleads Paragraph I of its first cause of action.

[fol. 16]

II

That plaintiff restates and repleads all of the unlawful and unauthorized acts of said railroad companies and the wrongs perpetrated by same upon the plaintiff, known to and unlawfully permitted by the defendant, and all facts relative thereto, as set forth in plaintiff's first, second, third and fourth causes of action.

III

That Section 18 of the Act of Congress approved April 26, 1906 (34 Stat. 137), provides in part as follows:

"Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Creek * * * tribe * * * for the collection of any moneys or recovery of any land claimed by * * * said tribe * * * and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits."

IV

That, although said facts as herein set forth were well known to defendant for many years, yet in violation of its express duties under said Section 18 of said Act of April 26, 1906, it has failed, neglected and refused to bring suits [fol. 17] for the collection of the moneys due from said railroad companies, or for the recovery of the lands wrongfully intruded upon and claimed herein by the Creek Nation, although often requested by plaintiff so to do; that by defendant's failure, neglect and refusal to perform its said duties under said Section 18, it became liable to the plaintiff for the compensation and the value of said lands of which the plaintiff has been so unlawfully deprived.

V

That at all times mentioned herein the plaintiff has had no redress, or now has the means or the right to recover in its own name said lands thus intruded upon, or to so collect the said compensation to be paid for the benefit of plaintiff as herein set forth, except through the action of the United States.

Wherefore, the premises considered plaintiff prays:

1. That under plaintiff's first and second causes of action defendant be required to account for the lands of said "station reservations" so unlawfully intruded upon, and that judgment be entered against the defendant for the full present value of same.

2. That under plaintiff's third cause of action defendant be required to account for the collection of said compen- [fol. 18] sation for the benefit of plaintiff as therein set forth, and that judgment be entered against defendant for the amounts found to be due plaintiff which were not so collected by defendant.

3. That under plaintiff's fourth cause of action defendant be required to account for the rents so collected by said railroad companies which defendant unlawfully permitted to be misappropriated and diverted from the funds of plaintiff, and that judgment be entered against the defendant for its failure to so collect the amounts of said rents and profits.

4. That under plaintiff's fifth cause of action defendant be required to account for the lands and moneys of which plaintiff has been so unlawfully deprived because of the failure, neglect and refusal of defendant to file and prosecute suits to recover same for the benefit of the plaintiff, and that judgment be entered against defendant for the full present value of said lands, and for the amounts of money so found to be due plaintiff.

5. That on all of said items due plaintiff interest be allowed at the rate of six per cent from the dates of said unlawful acts so complained of herein.

The Creek Nation, by E. J. Van Court, Its Attorney of Record.

Of Counsel: Paul M. Niebell.

[fol. 19] *Duly sworn to by E. J. Van Court. Jurat omitted in printing.*

[fol. 20] III. Demurrer to Second Amended Petition—Filed January 29, 1942, by leave of court

Now comes the defendant and demurs to each of the alleged causes of action in the second amended petition separately, upon the grounds that (1) the allegations of neither of the alleged causes of action state facts sufficient to constitute a cause of action against the defendant, and (2) the Court has no jurisdiction over the subject matter of either of the alleged causes of action, because no facts are alleged in either thereof which state a claim arising out of any treaty, agreement or Act of Congress.

Defendant demurs to each of the alleged causes of action numbered four and five upon the additional ground that the claims attempted to be alleged therein are first stated in the second amended petition which was not filed within the time specified in the Jurisdictional Act of May 24, 1924, 43 Stat. 139, as extended by the Joint Resolution of February 19, 1929, 45 Stat. 1229.

Respectfully submitted, Norman M. Littell, Assistant Attorney General. Raymond T. Nagle, Charles H. Small, Attorneys.

[fols. 21-22] IV. Argument and Submission of Case

On March 2, 1942, the case was argued and submitted on defendant's demurrer by Mr. Charles H. Small for defendant, and by Mr. Paul M. Niebell for plaintiff.

[fol. 23] V. **Opinion of the Court by Green, J.**—Filed June 1, 1942

Mr. Paul M. Niebell for the plaintiff. Mr. C. Maurice Weidemeyer was on the brief.

Mr. Charles H. Small, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the brief.

On Demurrer to Second Amended Petition

GREEN, Judge, delivered the opinion of the court:

The suit is based upon the action of certain railway companies in taking over a right-of-way through the Creek country under the Treaty of 1866, 14 Stat. 785, and the Act of February 28, 1902, 32 Stat. 43, and particularly in the appropriation of certain areas along the right-of-way for station reservations and the failure of the defendant to collect and pay to plaintiff the sums alleged to be due the plaintiff by reason of such wrongful action. Plaintiff's first amended petition alleged that these appropriations were not authorized by the Treaty or statute, that the land was not necessary for railroad purposes and was not used therefor but was rented by the railroads to third persons. Plaintiff also alleged that no compensation was paid for the land so taken and that annual charges prescribed by the Act of 1902 were not paid. Plaintiff further alleged that by the terms of the Treaty and the Act of 1902, the United States guaranteed against intrusion by the railroads and assumed the duty of collecting from the railroads the compensation and annual charges due and recovering money damages. Relief by way of money damages was demanded.

[fol. 24] Defendant demurred to plaintiff's first amended petition, on the ground, among others, that the court was without jurisdiction over the subject matter and set out no cause of action. This demurrer, at first, was overruled but afterwards a similar demurrer of the *Choctaw and Chickasaw Nations* v. *United States*, 75 C. Cls. 494, was sustained. The causes of action being essentially similar, the court withdrew its earlier decision in case at bar and sustained defendant's demurrer upon the authority of the *Choctaw and Chickasaw case, supra.* More than eight and one-half years after the approval of the Jurisdictional Act (May 24, 1924) 43 Stat. 139, plaintiff filed its second amended petition to which the defendant again demurs. It is contended on behalf of the defendant that no new cause of action is set up in the second amended petition or any cause of action whatever, and that following the decision in the *Choctaw and Chickasaw case,* the demurrer should be sustained.

In the second amended petition the plaintiff sets up five causes of action which may be summarized as follows:

In the first it alleges that by Article I of the Treaty of June 14, 1866, *supra,* the United States guaranteed to

the Creek Nation quiet possession of its national domain reserved under the treaty; that by Article V the plaintiff granted a right of way through its domain for the construction of a railroad; and that under this treaty it became the duty of defendant to supervise the right of way and protect plaintiff in the quiet possession of its lands not so granted. That defendant authorized two railroad companies to construct roads through the Creek domain and to take rights of way 200 feet in width; that defendant permitted these railroad companies to stake out certain "station reservations" along the rights of way which were not granted by the Treaty of June 14, 1866, which were not necessary to the operation of the railroads and were never used for railroad purposes; that such action was an unauthorized intrusion upon the lands of plaintiff permitted by defendant; that defendant knowing the facts has failed and refused to enforce the treaty and put plaintiff in possession of its lands, and therefore is liable to plaintiff for the value of the "station reservations" because of the violation of the treaty.

[fol. 25] The second count alleges similar wrongful actions on the part of other railroad companies which had constructed lines within the plaintiff's territory under the authority of the Act of February 28, 1902, *supra;* whose action it is said it was the duty of defendant to supervise, and in substance alleges that by reason thereof the defendant became liable to plaintiff in damages under the provisions of said act and the Treaty of 1866.

For a third cause of action, the plaintiff alleges that Section 15 of the Act of February 28, 1902, *supra*, provided that before any railroad should be constructed on any lands taken for railroad purposes full compensation for the lands taken and for damages done by the construction should be made to the tribe; that Section 16 thereof further provided that the companies constructing railroads under the Act of February 28, 1902, should pay to the Secretary of the Interior for the benefit of the nation through the lands on which the railroad was constructed an annual charge of $15 a mile for each mile of road constructed, but that defendant has failed to collect the compensation due.

For a fourth cause of action, plaintiff alleges that under Section 11 of the Act of April 26, 1906, 34 Stat. 137, the defendant was required to collect all revenues of whatever character accruing to the Creek Nation and that it therefore became the duty of defendant to collect for plaintiff the rents

and profits derived from plaintiff's lands thus unlawfully intruded upon by the railroads, but that in violation of its duties defendant permitted the railroad companies to collect the rents from plaintiff's land, thus depriving plaintiff of the benefits thereof, and that defendant has never accounted to plaintiff for these rents and profits.

For a fifth cause of action, plaintiff alleges that Section 18 of the Act of April 26, 1906, *supra*, requires the Secretary of the Interior to bring suit for the collection of any monies or the recovery of any lands claimed by the Creek Nation, and the United States courts in Indian Territory were given jurisdiction to try and determine such suits; that plaintiff has been deprived of the benefits of this provision by reason of the defendant failing to comply therewith, and by reason of its failure so to act defendant is liable to plaintiff for its violation of Section 18.

[fol. 26] By Article V of the treaty referred to in plaintiff's petition, plaintiff Indians granted a right-of-way through their lands to any company that should be duly authorized by Congress and should undertake to construct a railroad from north to south and from east to west through the Creek country and agreed to sell to the United States a strip of land (not owned or occupied by a member or members of the Creek Nation lying along the line of the contemplated railroad) three miles in width.

This authority could only be given by the enactment of a statute which was evidently contemplated by the Treaty.

Accordingly a statute was passed (Act of February 28, 1902, *supra*,) which provided for the construction of a railway or railways across the domains of the plaintiff tribe which specified particularly that the railway companies might take and use for the purpose of the railway and no other purpose, a right-of-way 100 feet in width through the lands of plaintiff and also an additional strip of 200 feet in width in the length of 2,000 feet in addition to the right-of-way, for stations for every eight miles of road all to be used only for the construction and convenient operations of the railways.

The first and second causes of action are based in part on the provisions in the treaty that "the United States guarantees them (Creek Indians) quiet possession of their country." This is followed in the treaty by the clause "and protection against hostilities on the part of other tribes" together with other statements in the same connection.

We think this guarantee of quiet possession referred to hostilities on the part of other tribes and not to encroachments by railroads which are not alleged to have done anything against the will of the plaintiff. This construction is strengthened by other provisions in the treaty by which the Creeks agreed to the disposition of their land for railroad purposes, and also by the provisions of the statute which followed.

The guaranty of quiet possession upon which the plaintiff relies could not apply to the right-of-way granted by the treaty for the construction of railways on the lands taken for station purposes. It was not possible for the Indians to [fol. 27] have "quiet possession" of lands used in the operation of railways. The statute enacted in pursuance of the treaty specified under what conditions the land might be taken, also the payments which should be made therefor. The defendant was not taking or using the land. The provisions with reference to payments manifestly apply to railway companies and not to the United States. The defendant neither directly nor by implication agreed it would be liable for damages in event the railway companies did not comply with the statute but instead prescribed the course which plaintiff should take to obtain payment for its land or compensation for its unauthorized use.

A fatal defect of the first two counts is the failure to show or allege any agreement or promise which would make the defendant liable for the action of third parties, which was held in effect to be necessary in the case of the *Choctaw and Chickasaw Nations, supra.* In that case, like the one before us, the petition alleged that a treaty authorized the construction of railroads through the plaintiff's lands, that railroads were constructed under this authorization, and in the process of construction certain tracts of land were set aside as station grounds. The petition then continues with an allegation that the lands taken by the railroads for station grounds were not necessary for right-of-way purposes, were not granted to the railroads under the treaty, were unlawfully appropriated, and the defendant has refused to protect the plaintiff's rights. The petition was held insufficient and although no general rule was laid down in sustaining the demurrer one reason given was that "No treaty or act of Congress is cited wherein the Government assumed liabilities of the character claimed in positive language * * *". The decision reviews the provisions of the Act

of 1902 upon which the plaintiff relies and gives as an additional reason for its ruling that there is "no provision of the act imposing liability upon the Government as herein claimed." (Page 501 of the opinion.)

There are other authorities which support this ruling.

In the case of the *Nez Percé Tribe of Indians* v. *United States*, 95 C. Cls. 1, certiorari denied May 25, 1942, it was [fol. 28] held that a provision in a treaty that no white man shall be permitted to reside upon the reservation of the Indians did not create an obligation on the part of the United States to respond in damages in event there was wrongful intrusion by the whites. This case also holds in effect that where a treaty does not expressly so provide, its violation by third parties will not impose upon the Government an obligation to respond in damages.

In *Pine Hill Company* v. *United States*, 259 U. S. 191, 196, the Supreme Court said: "A liability in any case is not to be imposed upon a government without clear words" and it is a well settled rule that the Government can not be sued without its consent which does not appear from either the Treaty or the Act of 1902.

The substance of the third count is that the plaintiff has not been paid for its lands taken for railway purposes and damages done, in accordance with the statute pleaded, and that it was the duty of the defendant to collect the compensation due; that defendant has failed to perform its duty in that respect and is consequently liable to plaintiff.

The statute provided that certain payments should be made before the land should be taken and also afterwards, but it nowhere required the defendant to collect such payments or make them. Instead it either directly provided that the constructing railways should pay whatever was due or made it plain that it was so intended without creating any liability on the part of the defendant. There is nothing in the statute from which it could even be implied that defendant would be liable if the payments were not made in accordance therewith. This count is therefore subject to the same general objections as counts one and two.

It will be observed that the fourth count of the petition seeks to recover rents and profits that are alleged to have been unlawfully collected by railroad companies wrongfully permitted to intrude upon plaintiff's lands. The statute upon which plaintiff relies, Act of April 26, 1906, *supra*, provides in section 11 thereof that "all revenues . . .

accruing to the Creek Nation shall be collected" by an [fol. 29] officer of the Department of the Interior, but the cause of action stated in this count is based upon an alleged trespass which, if committed, would not create any "revenues" but merely give cause for an action for trespass. It is obvious that the statutory provision upon which plaintiff bases this count has no application to the claim made in this count, and that nothing is stated therein which would furnish the basis for a suit to recover damages from the defendant on any ground.

As before stated the fifth cause of action alleged that Section 18 of the Act of April 26, 1906, *supra*, required the Secretary of the Interior to bring suit for the use of the Creek Nation for the collection of any moneys or for the recovery of any lands claimed by the Creek Nation. This fifth count does not expressly allege any duty on the part of the defendant but it is manifestly framed on the theory that if was the duty of the Secretary of the Interior to bring such suit or suits. The plaintiff, however, misstates the language of the section to which reference is made for it does not require the Secretary to take such action but merely authorized him to bring suit and makes no provision for liability on the part of the defendant in case he failed to do so.

The plaintiff contends that although the Act is permissive in form it is mandatory in effect but the authorities cited do not sustain any such general rule.

The act last cited was entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" and applied not only to the Creek Indians but the other four civilized tribes. It merely gave the Government permission in settling the affairs of these tribes to bring suit on claims made by them but did not require the defendant so to do. Here again there is no provision imposing liability if the Government fails to bring suit or anything from which such an obligation can be implied and the fifth count must also be held to state no cause of action.

In this connection, the plaintiff cites the case of the *United States* v. *Creek Nation*, 295 U. S. 103, 109, but the decision in this case was based upon facts which showed a direct liability on the part of the defendant and it has no application here.

[fol. 30] In all of the counts except the last, it is alleged in substance that the acts of the defendant constituted a violation of its duties but these allegations with reference to the "duty" of the defendant are merely conclusions of law and add nothing to the effect of the pleading.

For the reasons stated above, the petition as a whole must be held to state no cause of action but there is another and decisive reason for holding the first four counts insufficient.

The statute providing for the construction of railways through the lands of the plaintiff (Act of February 28, 1902, *supra*), made provisions both for ascertaining the amount due either the tribe or individual occupants of the land taken and for the payment thereof and further provided in Section 8 of the statute last referred to above "that the United States court for the Indian Territory and such other courts as may be authorized by Congress shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between the said Enid and Anadarko Railway Company and the nation and tribe through whose territory said railway shall be constructed," and also made a like provision with reference to the inhabitants of the nation or tribe and the railway company. The same provisions were also made applicable by the act with reference to the construction of a railway through the Indian lands by any other company duly authorized.

If a railway exceeded its rights in taking over the lands of plaintiff or failed to discharge its obligations to the Indians, then it became directly liable under the statute. It is the railway companies which are alleged to have violated the rights of the plaintiff nation and by such violation, if any, a controversy was created between the railways and the plaintiff nation. A full and complete remedy was provided by the statute in case any controversy should arise, but the remedy created was an action against the railway company and not one against the United States.

Plaintiff does not dispute the validity of this statute but relies upon it in stating the amount of land and the purpose for which it might be taken in constructing the railway. The provisions for determining the amount to be paid and enforcing the collection thereof are too long to set out here [fol. 31] but the United States is not a party to the proceedings under them and is not responsible in case the plain-

tiff failed to make use of them. The statute as a whole shows plainly that the constructing railway companies were solely accountable to the plaintiff for the land taken or used.

It thus appears that whatever duties growing out of the construction of the railways the defendant may have owed the plaintiff tribe, all have been discharged by the enactment of this statute which made elaborate provisions, not only for the determination by duly appointed referees of the amount due the Indians for their land taken or used, but also for the enforcement of any payments specified by the statute and the settlement of any controversy in relation thereto by conferring jurisdiction on a local United States court over all of these matters.

It must be presumed that the referees and other officers together with the courts discharged their duties under this statute and whenever any controversy arose by reason of the Indians making claim that they had not received the amount to which they were entitled as payment for their lands or use thereof, or denied in any way compensation to which they were entitled, their claims were heard and determined and they received what was due them accordingly. Now, long after the railways have been constructed (as the Court will take judicial notice), and proceedings in the forum provided for plaintiff have been barred on the claims now presented by the statute of limitations, the plaintiff tribe comes into court and seeks to set up new claims never before presented, upon which, if valid, it ought to have acted long ago.

There is nothing in the treaty or in the statute enacted pursuant to it that required the defendant to supervise the payments made to the Indians for the land taken by the railways, determine the amount which should be paid and require its payment for the benefit of plaintiff. On the contrary, the statute provided for the disposition of these matters by the referees and the courts.

The petition fails to allege any facts which would establish any liability or make the defendant in any way subject to suit by the plaintiff and for the reasons stated above we hold [fol. 32] that no cause of action is set out either by the several counts of the petition or the petition taken as a whole.

The defendant raises the objection as to part of the claims made by plaintiff that they are barred by the statute of limitations. What we have said above makes it unnecessary to

pass on this issue but it may be said that the objection evidently overlooks the provisions of the Act of August 16, 1937, 50 Stat. 650, which was passed after the expiration of the time for filing a petition herein under the original act and gave this court authority to hear plaintiff's case notwithstanding lapse of time or statute of limitations.

The demurrer to the petition must be sustained and the petition dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

[fols. 33-34] VI. JUDGMENT OF THE COURT.—June 1, 1942

This case was submitted upon the defendant's demurrer to the plaintiff's second amended petition; on consideration whereof the court is of opinion that the demurrer is well taken:

It Is Therefore Adjudged And Ordered that the defendant's demurrer be sustained and that the petition be and the same is hereby dismissed.

[fol. 35] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 36] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 321

ORDER ALLOWING CERTIORARI—Filed October 19, 1942

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.